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D.C. OFFICE OF ZONING

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April 25, 2006

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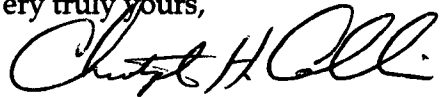
Mr. Geoffrey H. Griffis, Chairman
D.C. Board of Zoning Adjustment
441 - 4th Street, N.W.
Suite 210 South
Washington, D.C. 20001

Re: BZA Application No. 17431 – King's Creek LLC

Dear Mr. Chairman:

At the conclusion of the public hearing in this case on March 14, 2006, the Board allowed the party in opposition to respond in writing by April 11 to the materials submitted to the record by the Applicant on March 14. The Applicant was then given until April 25 to file a rebuttal to any submission filed by April 11. The Applicant and the party in opposition were also given until April 25 to file draft Orders.

Enclosed please find the Applicant's draft Order in the above-referenced case. The opposition party did not submit anything into the record by April 11; accordingly, no rebuttal is submitted herewith. Thank you.

Very truly yours,

Christopher H. Collins

CHC/skp

cc: Advisory Neighborhood Commission 1C w/enclosure
John Holmes w/enclosure
Dominique Kostelac w/enclosure

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BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17431
EXHIBIT NO. 53

Application No. 17431 of King's Creek LLC (the "Applicant") pursuant to 11 DCMR §§ 3103.2 and 3104.1 for special exception approval to allow a building height of fifty feet in the Reed Cooke Overlay (§ 1403.1); variance relief to permit additions to a nonconforming structure (§ 2001.3); variance relief to permit a floor area ratio of 2.66 (§ 402.4); and variance relief to permit an open court measuring sixteen feet in width (§ 406.1), in order to allow an addition to a nonconforming structure and conversion of a commercial/industrial property to a multiple dwelling use at the premises 2329 and 2335 Champlain Street, N.W. (Square 2563, Lots 103 and 816) (the "Application").

HEARING DATE: February 28, 2006 and March 14, 2006
DECISION DATE: May 2, 2006

DECISION AND ORDER

SELF CERTIFICATION:

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

PRELIMINARY MATTERS:

1. The Board of Zoning Adjustment (the "Board"), pursuant to its rules, provided proper and timely notice of the public hearing on this Application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission ("ANC") 1C and to owners of property within 200 feet of the subject site.
2. The subject site is located within the jurisdiction of ANC 1C, which is automatically a party to this Application. ANC 1C submitted a letter on February 21, 2006 opposing the requested special exception relief and taking no position with regard to the requested variance relief. Based upon further information supplied by the Applicant, ANC 1C submitted a supplemental letter on March 6, 2006 in support of the requested variance relief and taking no position with respect to the requested special exception relief.
3. The Board received five requests for party status in opposition. One request for party status in opposition was granted by the Board, to John W. Holmes, who asserted that he represented an LLC that owned the abutting property to the north of the subject site, as well as other property to the east across the alley. The Board left the record open to receive Mr. Holmes' written authorization to appear on behalf of the LLC. (Transcript, 2/28/06, at p. 101).

4. Six witnesses testified as persons in support of the Application. Three witnesses testified as persons in opposition to the Application.
5. As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements which are necessary to establish the case for variances and special exceptions pursuant to 11 DCMR §§ 3103.2 and 3104.1.
6. The Office of Planning ("OP") timely filed a report on February 21, 2006 that was partially in support of, and partially in opposition to, the Application.
7. The Board received a letter in support of the Application from Jim Graham, Ward 1 Councilmember.

FINDINGS OF FACT:

1. The subject site is known as 2329 and 2335 Champlain Street, N.W., and consists of Lots 103 and 816 in Square 2563 (the "Site"). The Site is located in the RC/R-5-B Zone District. Square 2563 is generally bounded by Kalorama Road on the south, Ontario Road on the east, Euclid Street on the north, and Champlain Street on the west.
2. The Site is surrounded by predominantly residential uses with a variety of other non-residential uses interspersed throughout the surrounding area. North of the Site is a parking lot, row houses, and apartment buildings, some of which are between five and seven stories in height. To the east of the Site is a fifteen-foot wide alley. Beyond the alley are row houses facing Ontario Road interspersed with some institutional and commercial uses. Immediately south of the Site at 2327 Champlain Street is a fifty-foot tall, 2.75 FAR, residential building approved and built in 2003-04 with sixty-eight apartments, pursuant to BZA Order No. 16931, dated December 20, 2002. Directly west of the Site, across Champlain Street, is the Lofts of Adams Morgan, a fifty-six foot tall, 3.63 FAR, mixed-use development that was approved for a 325-350 space parking garage, and has fifty-seven residential units and 4,000 square feet of retail space (ZC Order No. 832, dated December 26, 1997).
3. The R-5 Districts are designed to permit flexibility for all types of urban residential developments along with those institutional and semi-public

buildings that are compatible with adjoining residential uses. The R-5-B District permits developments of a moderate height and density. The primary purpose of the RC District is designed to protect existing housing and provide for new housing development.

4. Lot 103 was the subject of a previous BZA review in 2002 in Application No. 16869. The application requested variance relief from the height, FAR, lot occupancy and the non-conforming structure provisions to construct a mixed-use retail and residential building. The project included only Lot 103, and was to retain the retail use on the ground floor, with parking for 13 cars on the second floor, and four additional levels (19,539 square feet) were to be added for residential use. The application was supported by the Office of Planning and the ANC.

The Board approved the application with a building height of 69.6 feet and an FAR of 3.9 (BZA Order No. 16869). The Board concluded that the property was exceptional in two respects. First, the property is occupied by an "historic structure" with aesthetic appeal that adds to the architectural variety of the area, and demolition of that structure would be a loss to the community. Second, the building is surrounded by structures that have created a "canyon effect", serving to deprive the building of light and air. The Board also concluded that the strict application of the Regulations would impose a practical difficulty, and the relief could be granted without substantial detriment to the public good and to the zone plan.

The Zoning Commission took *sua sponte* action to review the BZA Order, and reversed the Board's decision (ZC Order No. 02-37). In its decision, the Commission noted that it may engage in *sua sponte* review of a Board decision "where it appears to the Commission that the Board has exceeded its prerogatives and has thus in effect changed the zoning" and/or "where it appears that a basic policy of the Commission, as expressed in the Zoning Regulations, has been violated as a result of Board action". *See* Order No. 02-37 at p. 2. The Commission cited the Applicant's claims of an exceptional situation or condition as including a need to retain the existing building on the site because of its architectural significance to the neighborhood, as well as the rezoning of the property to residential, and the irregular shape of the property.

The Commission noted that the building is not a landmark and the Applicant is not compelled to save it for that purpose. Moreover, the Applicant made no

showing of how it could use the structure as is, without zoning relief. The Commission further noted that the claimed practical difficulties "arise out of the design of the addition to the structure, not out of the existence of the structure itself," and that the Applicant had not shown a need to put an addition on the structure to make a reasonable use of it. See Order No. 02-37 at p. 3 (citing BZA Order No. 16815 of Adams Alley, LLC – the building was unsuitable for conversion to residential use without the proposed addition).

The Commission concluded that "with regard to the height and FAR variances, the Board failed to take into account the magnitude of the relief it was granting". In that case, the Commission concluded, the Board granted a de facto rezoning of the property by granting an FAR variance from 1.8 FAR to 3.9 FAR, and a height variance from 50 feet to 69.7 feet. The Commission concluded that "these leaps are just too great to be countenanced in the absence of truly exceptional circumstances . . ." Id. at p. 5.

5. The Applicant presented testimony and evidence in the present case in support of the proposed special exception and variance relief necessary for the addition to and conversion of the building to a multiple dwelling use (the "Project"), at a lower height and density than in the prior case. The current plan addresses the concerns raised by the Zoning Commission in the prior sua sponte case. The Applicant proposes to retain and redevelop the existing building by adding two additional floors and devoting the entire building to a 22-unit condominium apartment building with 21 below-grade parking spaces. The lot occupancy and rear yard measurement of the two-story addition will comply with the lot occupancy and rear yard requirements of the Zoning Regulations. The building will be 50 feet in height, with an FAR of 2.66, and will have a 10 foot tall roof structure which is proposed at 0.2 FAR, which is substantially set back from all sides of the building, and which is substantially less dense than the 0.37 FAR for a roof structure allowed by the Zoning Regulations. There will be a court on the north side of the building which extends below grade to provide natural light and ventilation to habitable space in that portion of the building.
6. The Zoning Regulations permit the Board to grant a special exception to allow a building height above the forty-foot height limit provided for in the Reed Cook Overlay subject to compliance with the criteria set forth in Section 1403. Based upon the evidence that testimony of record, each of those criteria are satisfied as follows:

- A. *Section 1403.1 (a) - The use, building, or feature at the size, intensity, and location proposed will substantially advance the stated purposes of the Reed-Cooke Overlay District.*

The purposes of the Reed Cooke Overlay include: Protection of current housing in the area, and provision of new housing development; Maintaining heights and densities at appropriate levels; and Protection of adjacent and nearby residences from damaging traffic, parking, environmental, social, and aesthetic impacts.

The proposal satisfies the purpose of the Overlay District as the development will not displace any existing residences, but in fact will increase the level of housing and add to the residential character envisioned for the Reed-Cooke area. The rezoning of Champlain Street from industrial to residential has led to the construction of a number of residential projects on that Street. The existing building has Certificates of Occupancy for retail on the first floor and office on the second floor. The conversion of this commercial use to residential, with below grade parking, will preclude the future use of the building for non-conforming commercial purposes, and will protect nearby residences from the adverse impacts brought on by the commercial operation of this building, including street congestion from customers and deliveries. The proposal provides sufficient parking on-site and therefore will not impact the shortage of parking in the Reed-Cooke area. The proposed height and density are consistent with surrounding developments as recently approved by the Board and the Commission.

- B. *Section 1403.1 (b) - Vehicular access and egress shall be designed and located so as to minimize conflict with pedestrian ways, to function efficiently, and to create no dangerous or otherwise objectionable traffic condition.*

The parking requirement in the R-5-B zone is one space for each two dwelling units, or 11 spaces. No parking is required for the proposed use, based upon the fact that the existing buildings currently do not provide any on-site parking, and the parking credits generated by the prior uses exceed the new residential parking requirement. The Applicant will provide 21 below-grade parking spaces in the proposed garage, including four tandem spaces, for the 22 units in the building.

The parking garage for the building will be accessed at the rear of the building through the alley and will have no impact on pedestrian passageways along the sidewalk. The alley can be accessed from Ontario Road, Kalorama Road and further north on Champlain Street, allowing for efficient access to the parking area. With 21 parking spaces, this development will not introduce a significant amount of traffic into the alley and will not cause any objectionable traffic condition.

- C. Section 1403.1(c) - *Adequate off-street parking shall be provided for employees, and for trucks, and other service vehicles.*

This requirement applies primarily to commercial uses. This is an entirely residential project, and there is no loading requirement for trucks or service/delivery vehicles for this Project. There will little demand for parking for employees, trucks, and service vehicles. There is an open area at the rear of the building adjacent to the alley that is available if necessary for a service vehicle.

- D. Section 1403.1 (d) - *If located within a C-2-B zone, the use shall not be within twenty-five feet (25 ft.) of a Residence District, unless separated therefore by a street or alley.*

Not applicable.

- E. Section 1403.1 (e) - *Noise associated with the operation of the proposed use will not adversely affect adjacent or nearby residences.*

There will be no excessive noise associated with the proposed residential use.

- F. Section 1403.1 (f) - *No outdoor storage of materials, nor outdoor processing, fabricating, or repair shall be permitted.*

Not applicable.

- G. Section 1403.1 (g) - *The use, building, or feature at the size, intensity, and location proposed will not adversely affect adjacent and nearby property or be detrimental to the health, safety, convenience, or general welfare of persons living, working, or visiting in the area.*

The proposed residential use is in keeping with the objectives of the Reed-Cooke Overlay to provide for the development of new housing. The development represents an adaptive reuse of an underutilized building for residential use consistent with District policies. The addition to the existing building will not adversely affect the surrounding community. The proposed increase in height over that permitted by the Overlay District is consistent with the fifty foot height of the neighboring building to the south that was granted by the Board in Order No. 16931, as well as across Champlain Street in the project approved by the Zoning Commission in Order No. 832. The new upper floors of the Project will be set back from the front facade, beginning at a height of approximately twenty-six feet, thus facilitating more light and air to the street than a matter of right forty-foot building. The design of the building provides for private open space areas. Roof surfaces are to be terraced with substantial planting and trees to provide for a "green" roof that will reduce urban heat and add to the visual beauty of the building.

The matter of right height of a building in the RC/R-5-D zone is forty feet. A roof structure of 18.5 feet is allowed, provided it is set back from the front and rear exterior walls by a distance equal to its height above the roof. The Project will be fifty feet tall, but will have a penthouse that is only ten feet tall and is set back from all sides (front, back, and sides) a distance at least equal to, and in many instances far greater than, its height. The shadow studies presented by the Applicant graphically demonstrated the absence of an adverse impact on the surrounding area, as compared to a matter-of-right project.

The building will provide parking for its residents and therefore will not adversely impact the parking availability in this area. Access to the parking will be from the alley in the rear, thereby reducing the possibility of congestion and pedestrian conflicts on Champlain Street. Abandoning the retail and office use will also eliminate commercial delivery traffic to the front of the building. A significant amount of usable space will be devoted to the parking ramp to the garage in the newly excavated lower level. Great effort was made to meet the request of the community that sufficient parking be provided to match the unit count as closely as possible.

6. Under D.C. Code §6-641.07(g)(3) and 11 DCMR §3103.2, the Board is authorized to grant an area variance where it finds that three conditions exist: the property is unusual because of its size, shape, topography or other extraordinary or exceptional situation or condition; the owner would encounter practical difficulties if the zoning regulations were strictly applied; and the variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map. The Applicant is seeking variances to allow an addition to a non-conforming structure; to exceed the permitted FAR; and to allow a court of less than the required dimension. Based upon the evidence and testimony, the Application meets all three prongs of the area variance test.

- A. The Property Is Unusual Because of its Size, Shape or Topography or is Affected by an Exceptional Situation or Condition. The nonconforming two-story stone, steel, concrete and brick building on Lot 103 was originally built in 1924 as an automobile repair facility prior to the advent of zoning in the District of Columbia. The property was zoned industrial and was occupied by a variety of commercial and industrial uses for its entire life. Recently, the property was rezoned to RC/R-5-B, and has a certificate of occupancy for retail use on the first floor, and office use on the second floor. The property is currently vacant. There is no parking on site. The two-story, 24-foot tall building has an FAR of 1.9 and a lot occupancy of 92.4%. Automobile repair is not permitted in the RC/R-5-B zone. As a result, the building has become a nonconforming structure devoted to a nonconforming use, that does not meet the lot occupancy, FAR and rear yard requirements of this residential zone.

The only non-residential uses that are permitted in the building without a use variance are retail and office use. The building is no longer viable as a retail or office use, because of the shift in the character of the neighborhood from commercial and industrial to predominantly residential. The owner has tried to lease the building for the permitted commercial purposes but has been unable to find any tenants willing to lease the building for those uses.

The exceptional situation or condition is further complicated by extensive underground petroleum contamination beneath the existing building, from the former gas station to the north, as well as by the

fact that the existing building was found to be settling. Several years ago, after the *sua sponte* reversal, the owner discovered that the front façade of the building and solid granite perimeter walls were becoming unstable, due to vibrations caused by area construction. Efforts to stabilize the dangerous crumbling façade and solid granite perimeter walls required rebuilding the foundations deep down to the bottom of a refilled stream bed. Substantial parts of the original foundations were apparently built on ash and fill dumped into this creek soon after the Civil War. Anticipated costs quickly escalated as unavoidable contact was made with this petrochemical spill. Approximately 8,000 tons of contaminated soil have been removed from the site to date. The property is not yet completely remediated and remains vacant.

Both the Board of Zoning Adjustment and the D.C. Court of Appeals have consistently found that the existence of an outmoded and obsolete building on a site can be considered an exceptional situation or condition. See Clerics of St. Viator, Inc. v. D.C. Board of Zoning Adjustment, 320 A.2d 291, 294 (D.C. 1974). The Court in Clerics held that "it makes no practical difference whether the inability to use property in accordance with Zoning Regulations stems from topographical conditions of the land itself or from the existence of a structure on the land". Id. The Clerics case involved a 12-year old religious seminary building in an R-1-B zone, surrounded by residential dwellings. Due to circumstances beyond the control of the petitioner in that case, the property became obsolete for its originally-intended use. The petitioner was unable to sell or lease the building to other religious or educational institutions, and use of the property for a matter-of-right residential use would have resulted in undue financial hardship due to the necessity of demolition, removal and compacting back of the building foundation. Id. at 293. The Board notes that the building in the Clerics case was not a historic landmark, nor did the Board or the Court in that case require a finding that the Applicant was precluded from demolishing that building because of historic preservation considerations. The Applicant's demonstration in that case that demolition was precluded due to undue financial hardship was sufficient for the Court of Appeals.

This case is similar to Clerics, in that the existing building was built for a purpose which is no longer permitted under the current Zoning Regulations. The Applicant has been unable to lease the property for

the retail and office uses which are permitted by the current Zoning Regulations. The property is surrounded by residential uses, and the building has become obsolete for its intended use due to a number of factors beyond the control of the Applicant. Moreover, the exceptional situation or condition in this case arises out of a confluence of factors, which together affect this property in an exceptional way. See *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1169 (DC 1990) (Uniqueness for purposes of the variance test can arise from a confluence of factors).

The Applicant proposes to create a landscaped, below-grade areaway at the lowest residential level of the proposed building on the northern portion of the Site at the rear of what is currently Lot 816. The landscaped areaway is designed as a terrace in order to provide light and air to the proposed bedroom on the lower level of the building. This area is currently the rear yard of the building on Lot 816, but when combined with Lot 103, will become an open court measuring 16 feet in width. The open court is bounded by property lines to the north and east as well as by the walls of the building to the south and west with an existing opening out to the alley in the rear. The wall bounding the southern side of the court is the side of the masonry and stone building on Lot 103. This wall is a foundation wall that extends 17 feet below grade. The exceptional situation arises from the fact that neither this foundation wall nor the north lot line can be moved or adjusted to allow for the required court width. The required court width is a function of its height. The court will substantially meet the court width requirement at and above the grade level. The inclusion of this below-grade areaway is the reason that the court variance is required.

- B. Strict Application Would Result in a Practical Difficulty to the Owner. The D.C. Court of Appeals has held that, to satisfy the practical difficulty element of the area variance test, an applicant must demonstrate that "compliance with the area restriction would be unnecessarily burdensome." *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d at 1170 (D.C. 1990). In that case, the Court noted that "the severity of the variance(s) requested;" "the weight of the burden of strict compliance;" "the effect the proposed variance(s) would have on the overall zone plan;" and the "increased

expense and inconvenience to applicants for a variance are among the proper factors for BZA's consideration." *Id.* at 1171.

- i. FAR and Non-Conforming Structure Variances. The strict application of the FAR and non-conforming structure limitations of the RC/R-5-B zoning regulations would allow only the following:
 - a. Demolition and removal of the entire building from the site and redevelopment under the existing zoning;
 - b. Use of the existing building in accordance with the existing retail and office certificates of occupancy;
 - c. Conversion of the existing building to residential use; or
 - d. Partial demolition of the existing building to reduce the lot occupancy to 60%, with construction of a new third level to the building.

The Applicant addressed these four theoretical options through testimony and evidence as follows:

- a. Demolition and removal of the entire building would result in a financial hardship to the Applicant. Substantial sums of money have been invested thus far to stabilize the building foundation and to remediate the below-grade petroleum contamination. Since acquisition, the total investment thus far in foundation stabilization and petrochemical remediation amounts to approximately 4.4 million dollars. Demolition of the existing building would result in a waste of that substantial investment and would pose an extreme economic hardship. Removal of the building from the site would also result in a practical difficulty. The owner has been notified by several persons in the community that any attempt to demolish the existing building or substantial parts of it would be met with a historic landmark application.
- b. Use of the building for retail and office purposes in accordance with the existing certificates of occupancy would also pose a practical difficulty. Due to the rezoning of the area to residential, and the subsequent development of residential uses in the area, the area is no longer a desired location for commercial, office, or retail purposes. The Applicant has attempted to find tenants who would lease the property for these purposes, but this

effort has been unsuccessful. The petrochemical remediation is not yet completed, and further investment would be necessary to finish that work. The income from the commercial occupancies in this building has historically been \$120,000 per year. Taxes are approximately \$30,000 per year, and interest payments on the loan to perform the foundation stabilization and remediation is approximately \$700,000 per year, thus any commercial lease of this property would fall far short of the expenses generated by the property.

c. Similarly, conversion of the existing building to residential use would pose a practical difficulty. The first two floors of the existing building are up to 120 feet deep from front to back with sixteen-inch solid granite walls largely on the property line. The north and south facades currently have no windows. All required windows will have to be cut through sixteen inches of solid granite, and supported to maintain them, at great expense. The resulting top (second) floor residential units would be surrounded by taller buildings on three sides, with windows on lot lines or facing future building walls only several feet away. The front units on the first floor will have their only windows opening on to the sidewalk level, with sidewalk pedestrians having the ability to look into the private interior space. The Applicant testified that in the proposed development project, these lower floor units will likely be greatly discounted when sold. It is well known that the upper floors of a residential building are more valuable and desirable than the lower floors. In this case, all units developed in the two-story building would be "lower floor" units, with taller buildings surrounding the site on all sides. Such units could not be sold for the cost to develop them, and there would be no "upper level" units to help offset the lower sale prices of the "lower level" units.

d. Demolition of approximately one-third of the existing building footprint, and construction of a third floor to the building to meet both the lot occupancy and FAR requirements, would also cause a practical difficulty. Given the nature of the construction of this building, and the depth of the foundations, it is not a simple matter to remove approximately one-third of the footprint of the two-story building. Significant additional

foundation stabilization and new footings would need to be constructed, the thick granite walls would have to be carefully cut, and a new rear wall would need to be constructed. This work, in addition to the required removal of substantial new foundation work which stabilizes the existing structure and that is intended to provide for future below-grade parking, would also be prohibitive. Even assuming that the demolition occurred only at the rear third of the building, this may be enough to trigger the threatened historic landmark designation. The potential revenue generated by this development would not be enough to offset the costs of the construction. The new third floor would be less than 40 feet in height, and would be surrounded by taller buildings on three sides.

- ii. Open Court. A strict application of the open court regulations would also result in a practical difficulty. The court will be located at the rear of the northern-most portion of the building, and will extend in height from the basement level to the top of the enclosing wall of the building. The open court width would substantially comply with the Zoning Regulations if the open court did not extend below grade. The below-grade extension is intended to provide light and ventilation to a portion of one of the dwelling units at the basement level. The strict application of the Regulations would preclude the ability to provide natural light and ventilation to this lower-level room.

- C. No Substantial Detriment to the Public Good Nor Substantial Impairment to the Intent, Purpose and Integrity of the Zone Plan. There will be no substantial detriment to the public good or substantial impairment to the intent, purpose and integrity of the zone plan by approving the requested variance relief.

The proposed variance relief will not be detrimental to the public good or the zone plan. The existing building has existed in this neighborhood for over eighty years. Retaining the existing building and adding residential uses in the manner proposed will be consistent with the goals of the Comprehensive Plan and the Reed-Cooke Overlay to encourage new residential developments in the community.

The request to increase the FAR of the building will not be detrimental to the public good or the zone plan. In fact, it will be consistent with prior approvals of the Board in this area. Furthermore, it will allow for the adaptive re-use of this existing building for residential uses as envisioned and encouraged by the Reed-Cook Overlay. The proposed increase in FAR will allow for an addition that will minimize visual impacts along Champlain Street and the surrounding area, by substantially setting back the two new additional levels from the front parapet line. This allows for additional light to the street, as well as to each unit consistent with the intent, purpose and integrity of the Zoning Regulations to provide adequate light and air. If the site was vacant, a matter-of-right design could be created that would provide approximately the same square footage as proposed, utilizing first floor residential spaces that are classified as "cellar" space and thus not included in FAR. The presence of the existing building on the site precludes this as an option.

A variance from the court width requirements will not be detrimental to the public good or Zone Plan. The below-grade landscaped area will not be visible to the public. It will be behind the northern portion of the building approximately mid-way between the front and the back of the site. The open court measures sixteen feet wide and the requested relief of 3 feet 11 inches is de minimis.

7. The Office of Planning ("OP"), by its report filed on February 21, 2006, and by testimony at the hearing, did not recommend that the Application be approved as proposed. OP recommended approval as existing conditions of the variances for court width and lot occupancy and denial of the variances for FAR and expanding a nonconforming structure. OP further recommended that the private access areas to the roof from the units below be reduced.

OP found that the economic justification for additional FAR and expansion of a nonconforming structure was not satisfactory. Furthermore, OP asserted

that the Applicant did not provide sufficient evidence that the existing structure could not be demolished.

The Board has afforded great weight to the OP analysis and report. The Board concurs with OP's support of the variances for court width and lot occupancy. The Board concludes that, based upon the evidence and testimony in the record, there is sufficient economic hardship justifying the additional height, FAR and expansion a nonconforming structure. The Board further concludes that the presence or absence of a regulatory bar to demolition is not dispositive on the issue of whether the building can be demolished; rather, as in Clerics, the issue is whether demolition would pose a practical difficulty. The Board finds that the Applicant has demonstrated such a practical difficulty in this case. The Board's findings are based in part on the Economic Feasibility Report submitted by the Applicant as Exhibit 51 of the Board record.

8. ANC 1C initially opposed the requested special exception relief and took no position with regard to the requested variance relief, by letter dated February 21, 2006. Opposition to the requested special exception relief was based on the additional height and concerns about the roof structure size and use.

Subsequent to ANC 1C's initial review, the Applicant revised the Project plans to respond to the ANC's concerns. By supplemental letter dated March 6, 2006, ANC 1C supported the variance requests and took no position on the special exception request. ANC 1C indicated that at its March 1, 2006 regularly scheduled and duly noticed meeting, ANC 1C voted to support the requested variances.

The Board has afforded great weight to the ANC analysis and report. The Board concurs with the ANC's support of the variance requests based on the burden of proof demonstrated by the Applicant. The Board is unable to give any great weight to the ANC's position on the special exception request.

9. Six individuals testified in support of the Application. One of those six individuals, Mr. Jeffrey Schoenberger, testified that he was the managing member of the LLC that owns a partial interest in the abutting property to the north, of which the party in opposition, John Holmes, claims sole ownership, and that he is in a title dispute with an entity of which John Holmes is a member. Mr. Schoenberger and the other five individuals, all of

whom are residents and property owners in the area, spoke in support of the Project's impact on the neighborhood, and in support of the Applicant.

10. One party, John Holmes, spoke partially in support and partially in opposition to the Application. His concern was primarily with the shadows that the Project would cast on the proposed building on the site to the north of the subject property. He testified that he was not aware of the current building plan that was before the Board for consideration, but based his testimony instead on the prior plan originally submitted with the Application.
11. Three individuals spoke in opposition to the Application, based upon the proposed building height and density, the shadows from the Project, and the impact on the street trees. In cross examination, they conceded that a matter-of-right building would have substantially the same impact as the building under consideration in this Application.
12. In response to the concerns raised by the party and the persons in opposition, the Board notes the consistency between the proposed Project, which will be fifty feet with a ten-foot penthouse that is substantially set back from all edges of the roof, and a matter-of-right development on this site, which could be forty feet with an 18.5 foot penthouse that needs no set back from the side lot lines. The total permitted matter-of-right building height is only 1.5 feet lower than the total height of the proposed Project, and the upper floors, above the 26 foot height, and the roof structure of the proposed Project, are both substantially set back from the north edge of the subject site. The Applicant demonstrated through testimony and evidence that the Project's height and massing are consistent with development in the surrounding vicinity, and that the Project will have no adverse impact on the opponent's properties, particularly when compared to a matter of right development.

The Board finds that the Applicant's Economic Feasibility Report demonstrates that it is economically infeasible to redevelop the Site under existing zoning restrictions in order to achieve the community-desired conversion to residential use, and the proposed development is a reasonable alternative to allow adaptive reuse of the property for residential purposes.

CONCLUSIONS OF LAW AND OPINION:

Based upon the foregoing Findings of Fact, the Board concludes that the Applicant is seeking a special exception under Section 1403.1 of the Zoning Regulations and variances under Sections 2001.3, 402.4 and 406.1 of the Zoning Regulations.

For purposes of the special exceptions and variances, the Applicant must prove that it has complied with the applicable requirements of the Zoning Regulations. Based on the evidence and testimony, the Board concludes that the Applicant has complied with each of the criteria. The Board also concludes that the Applicant has met the burden of proof with regard to the special exception for additional height in the Reed Cook Overlay under Section 1403.1. The Board also concludes that the Applicant has met the burden of proof for the variances from the additions to nonconforming structures under Section 2001.3, floor area ratio requirements under Section 402.4, and open court width requirements under Section 406.1.

The Board concludes that the proposed Project will present no substantial detriment to the public good, nor will it substantially impair the intent, purpose, or integrity of the zone plan. The Board further concludes that the Project will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and will not tend to affect adversely the use of the neighboring property in accordance with the Zoning Regulations and Zoning Map.

The Board further concludes that the Office of Planning and the ANC 1C have been given the "great weight" to which they are entitled.

In light of the foregoing, the Board **ORDERS** that the Application be and the same is hereby **GRANTED**.

VOTE: __-__-__ (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, John A. Mann II, Gregory Jeffries)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____
Jerrily R. Kress, FAIA
Director

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 25 IN TITLE 1 OF THE D.C. CODE. *SEE* D.C. CODE § 1-2531 (1999). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

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